

THE ONTARIO HUMAN RIGHTS CODE

R.S.O. 1990, C. H-19

IN THE MATTER of the complaint of Lynn Gosselin dated January 19, 1990 alleging discrimination in employment on the basis of pregnancy by The Kenora Ballet School and Gerda Vidovic and Angie Wrighton.

A HEARING BEFORE:

LORETTA MIKUS

Appointed a Board of Inquiry
into the above matter by the
Ministry of Citizenship, the
Hon. Elaine Ziemba, to hear
and decide the above noted
complaint.

APPEARANCES:

Ms. Sharon Ffolkes-Abrahams, Counsel for the Commission
Lynn Gosselin, Complainant

Mr. T. O'Flaherty, Counsel for the Respondents
Gerda Vidovic, Respondent
Angie Wrighton, Respondent

DATE AND PLACE OF HEARING;

August 31 and September 1, 1993
in Kenora, Ontario.

BACKGROUND

The Complainant, Lynn Gosselin, was hired by the Kenora Ballet School (hereinafter referred to as "School") in September of 1988 to teach four aerobics classes a week over a four-week period. Her terms of employment were casual and she was hired on a month-to-month basis depending on enrolment. From September of 1988 until November of 1989 she taught classes every month except for July, which she requested off for personal reasons. On October 30, 1989, Ms. Gosselin advised Ms. Gerda Vidovic, the owner of the School and Ms. Angie Wrighton, daughter of Ms. Vidovic and a director of the School, that she was pregnant. On November 1, 1989, Ms. Gosselin was told by Ms. Wrighton that her services were being terminated. Ms. Gosselin alleges that she was terminated because of her pregnancy. Ms. Wrighton and Ms. Vidovic contend that she was terminated for other reasons, namely her refusal to modify her aerobics class to accommodate her pregnant condition and her refusal to sign a legal release form absolving them of responsibility in the event she should encounter any difficulties in her pregnancy as a result of the aerobics class.

By letter dated March 12, 1993, I was appointed to convene a hearing into the matter to determine the grounds upon which Ms. Gosselin was terminated and whether those grounds constituted a violation of the Human Right's Code R.S.O 1990, c H-19.

THE FACTS

Ms. Gerda Vidovic founded the Kenora Ballet School in 1954. Ms. Angie Wrighton is Ms. Vidovic's daughter and, at the time of the termination of Ms. Gosselin, was a director of

the Company. In her words she was "preparing to take over the school".

Ms. Gosselin testified that she had registered students for the class beginning the month of October in the usual fashion. She, however, had to be away for two weeks during that four-week class to attend some courses in Belleville related to her full-time job as an Investigation and Support Clerk for Immigration Canada. While Ms. Gosselin was in Toronto, she confirmed the fact that she was pregnant. On her return, during the registration for the classes that were to begin October 30, 1989 for the month of November, Ms. Gosselin advised Ms. Wrighton that she was pregnant but that she intended to continue with her classes. She taught class on the Monday, October 30, 1989 and Tuesday, October 31, 1989.

On November 1, 1989 while Ms. Gosselin was preparing for her class, Ms. Wrighton asked to speak with her in the studio. Ms. Wrighton advised Ms. Gosselin that she was going to cancel the rest of the classes for the month of November. Ms. Gosselin was very upset and asked why she would cancel them since she had already taught two of the classes. Ms. Wrighton told Ms. Gosselin that she and Ms. Vidovic wanted her to enjoy her pregnancy and felt that it would be in their best interest if she did not continue to teach the aerobics class. Ms. Gosselin offered to obtain a medical opinion from her doctor as to her fitness to continue the programs and to sign a medical release waiver. She explained to Ms. Wrighton that her baby was not due until June of 1990 and that it was her intention to continue to teach her classes until March of that year. Ms. Gosselin realized

that Ms. Wrighton was not going to change her mind and suggested that Ms. Wrighton notify the class of cancellation.

When they walked into the gym, Ms. Gosselin told the students not to bother changing into their gym clothes because Ms. Wrighton had something to tell them. Ms. Wrighton told the class that because of Ms. Gosselin's pregnancy, the classes were being cancelled. Many of the women in the class became quite upset and one of the students, Ms. Josevitch, asked Ms. Wrighton whether she thought pregnancy was an illness. Many of the students in the class suggested that it was up to Ms. Gosselin to make the decision to cancel classes, not Ms. Wrighton. Ms. Wrighton explained to the class that if Ms. Gosselin was to get hurt or if the baby was to suffer any injury, the School would be responsible.

Ms. Gosselin testified that she was upset, disappointed and embarrassed at Ms. Wrighton's announcement. She described the class as a low impact aerobics class which would have been totally appropriate for a pregnant woman. She designed the class herself and offered to modify the class when and if it became necessary. She explained that she would have been able to substitute less vigorous steps at some stages of the program and that she could have asked one of the students to demonstrate the steps while she instructed. She testified that Ms. Wrighton seemed unwilling to acknowledge her suggestions.

Ms. Gosselin provided Ms. Wrighton with a letter dated November 9, 1989 from her family physician which stated the following:

To Whom It May Concern:

Lynn Gosselin is currently eight weeks pregnant, due on June 22, 1990.

She has been doing aerobics for the past five years. I have advised her that she may continue to do aerobics during her pregnancy with no undue harm to her or the baby. Obviously, appropriate adjustments in her schedule will have to be made near term.

That letter was signed by Dr. Bruce Daley, the Complainant's family physician. Dr. Daley testified at the hearing and it was his opinion that Ms. Gosselin was physically fit to continue teaching the aerobics class at the time of her termination. He described her as being in excellent health and suggested that she was a very reliable person who was very concerned about her own well being and the well being of her baby. In his opinion, exercise during pregnancy is desirable, especially for a patient like Ms. Gosselin, that is, someone who is accustomed to rigorous physical activity. He suggested that, at a later stage in her pregnancy, she might have needed to modify her program, but that would have not been necessary until at least the seventh month of her pregnancy.

Several of the students in Ms. Gosselin's class testified about the events of November 1, 1989. Their testimony corroborates that of Ms. Gosselin concerning Ms. Gosselin's description of Ms. Wrighton's announcement to the class. Ms. Leanne Kearney testified that Ms. Wrighton told them that she did not want Ms. Gosselin to continue with the class because she was pregnant. Ms. Wrighton said that they did not want to take a chance with the condition of the baby or Ms. Gosselin. Many of the students in the class, according to Ms. Kearney, felt that the decision should have been up to Ms. Gosselin and

spoke up on her behalf in that regard. Ms. Kimberly Reynard, another student, testified that they were told the only reason the class was being cancelled was because of Ms. Gosselin's pregnancy. She recalled that there might have been some suggestion of insurance concerns, but that the primary reason given by Ms. Wrighton was Ms. Gosselin's pregnancy. Ms. Tracy Munn's description of the events of November 1, 1989 are consistent with those of the previous two witnesses.

Ms. Angie Wrighton has been a teacher at the Kenora Ballet School for approximately twelve years and, at the time of the incident, was a newly appointed director. She testified that the School ceased to operate two or three years ago because of a decline of student enrolment. It was her evidence that Ms. Gosselin's classes were cancelled because of a private conversation she had with Ms. Gosselin in her office on November 1, 1989, but further suggested that the School had concerns about Ms. Gosselin prior to that discussion. According to Ms. Wrighton, the School began having difficulties with Ms. Gosselin in the spring of 1989. The only incident she referred to however concerned a stereo system that was damaged during one of the evening classes. Ms. Vidovic and Ms. Wrighton blamed Ms. Gosselin for the fact that the stereo system had been damaged and confronted her with it prior to an aerobics class. According to Ms. Wrighton, Ms. Gosselin was very angry at being accused of breaking the stereo system and stated that if they didn't trust her, she would resign. She apparently wrote on a large piece of cardboard that classes would be cancelled until further notice. She wrote and posted this notice without the consent or knowledge of Ms. Vidovic or Ms. Wrighton. Ms. Gosselin later

med down, changed her mind about resigning, removed the sign cancelling classes and continued to teach until her termination on November 1, 1989. Ms. Wrighton's memory of the date of the incident was very indefinite. I was, however, provided with the receipt for the new stereo equipment dated October 7, 1989. Clearly the incident concerning the stereo system occurred prior to that date and there is no dispute that Ms. Gosselin continued to teach for the month of October, 1989 and was allowed to register students for the month of November, 1989.

As well, Ms. Wrighton and Ms. Vidovic asserted that Ms. Gosselin refused to or failed to insure that the students in the class sign the appropriate release forms prior to the commencement of the classes in November of 1989.

With respect to the issue of Ms. Gosselin's pregnancy, Ms. Wrighton testified that when Ms. Gosselin told them on October 30, 1989 that she was pregnant, she and Ms. Vidovic were very pleased for Ms. Gosselin and cautioned her to be careful to insure her continued good health and the health of her baby. According to Ms. Wrighton, Ms. Gosselin agreed that she would modify her aerobics program to take into account her pregnant condition.

Ms. Wrighton attended at class with Ms. Gosselin on October 30 and 31, 1989, because she was concerned that Ms. Gosselin would be unable to operate the newly purchased stereo system. During those two classes, Ms. Wrighton became concerned about the

physical activity involved in the aerobics class and the fact that Ms. Gosselin did not seemed to have modified the program as promised. On Wednesday, November 1, 1989 she called Ms. Gosselin in to discuss her concerns. She requested that Ms. Gosselin obtain from her own lawyer a legal waiver of responsibility School in the event that there should be any problems with Ms. Gosselin continuing to teach aerobics. According to Ms. Wrighton, Ms. Gosselin refused to sign a legal waiver. Ms. Gosselin told her that nobody had a right to tell her what to do with her body and further told her that she intended to continue in her normal lifestyle and that if "the seed inside can't keep up to my lifestyle, it can drop out". Ms. Wrighton was shocked by the comment and even more concerned about Ms. Gosselin's intentions with respect to any modifications to her program. Ms. Wrighton testified that she suggested that one of Ms. Gosselin's students act as a demonstrator in her class, a suggestion Ms. Gosselin rejected. On the basis of Ms. Gosselin's attitude and refusal to cooperate, Ms. Wrighton decided that she had no alternative but to cancel her classes.

Ms. Wrighton stated that Ms. Gosselin preceded her into the gym and announced to the class that classes were being cancelled because of her pregnancy. Ms. Wrighton felt she had no choice but to agree with Ms. Gosselin's characterization of the reasons for the cancellation. She did not want to mention the conversation in the office between herself and Ms. Gosselin because of the personal nature of it. She discussed the cancellation of the class with the students but was not persuaded to change her mind.

She phoned Ms. Vidovic, who was in Winnipeg, Manitoba at the time, to advise her of the events and, after a discussion with her, resolved to cancel classes. Ms. Vidovic did not offer any evidence as to the events of November 1, 1989 but did corroborate Ms. Wrighton's evidence regarding concerns they had about Ms. Gosselin's suitability for continued employment. She reiterated their concerns about Ms. Gosselin's unilateral decision to cancel classes following the altercation related to the stereo system. She was, however, confused as to the timing of that incident and suggested it had occurred immediately before Ms. Gosselin was terminated. In fact, based on the receipt for the new stereo system and Ms. Wrighton's evidence, I am persuaded that difference of opinion took place at the end of September or the beginning of October, 1989. In any event, Ms. Vidovic was of the opinion that Ms. Gosselin's behaviour in front of the class on November 1, 1989, was inappropriate and unprofessional and below the standards that she would expect of somebody employed by her School. She confirmed Ms. Wrighton's decision to terminate Ms. Gosselin's services.

ARGUMENT

Ms. Folkes-Abrahams, for the Commission, relied on several cases, in particular: *Foster Wheeler Limited v. Ontario Human Rights Commission and Gladstone Leslie Scott* (1987), 8 C.H.R.R. D/4179 (Divisional Court); *Magnusson v. Merlon Management Ltd.* (1986), 86 C.L.L.C. 17,019 (Saskatchewan Board of Inquiry), *Nguyen v. Pacific Building Maintenance Ltd.* (1991), 91 C.L.L.C. 17,025 (Saskatchewan Board of Inquiry); *Holloway v. MacDonald* (1983), 83 C.L.L.C. 17,019 (B.C. Board of Inquiry); *Jenner v. Pointe West Development*

Corp. and Dennis Lavery (1993) unreported (Ontario Board of Inquiry).

Those cases stand for the propositions that, even if the motives of the respondents were well intended and in the best interest of the complainant, nevertheless their actions would still be unlawful if they amounted to an infringement of a right under the Code. They also stand for the proposition that when there is a question as to the ability of a pregnant woman to perform her duties, the opinion of a medical expert should be preferred over that of an employer. And, finally, that although there may be other reasons advanced for the termination that are accepted by a Board of Inquiry, if one of the reasons is found to be an infringement of a right under the Code, the termination is improper and constitutes a violation of the Code.

The Commission argued that the Complainant is entitled to damages. Ms. Vidovic and Ms. Wrighton terminated the services of the Complainant because she was pregnant. Had they not terminated her services, Ms. Gosselin's evidence is that she would have continued to work until March, 1989, when she would have re-evaluated her condition. Ms. Gosselin is seeking damages in the amount of \$1,800.00 for lost wages. That sum represents the amount of money she would have received had she been allowed to continue teaching the classes. As well Ms. Gosselin is asking for prejudgment interest for 3.83 years at a rate of 10% which equals \$262.21.

As general damages, Ms. Gosselin is seeking the sum of \$3,000.00, as compensation for

the embarrassment and mental anguish she suffered as a result of her termination. Ms. Gosselin testified that she was embarrassed by the manner of her termination. She testified that she developed the class and built up the clientele. After her termination the enrolment in the class declined and most of her students did not re-enrol at the Kenora Ballet School. Ms. Gosselin is seeking the sum of \$3,000.00 plus interest for a period of 3.83 years at the Bank of Canada rate of 10%, which equals \$300.00.

Mr. O'Flaherty, Counsel for the Respondent, agreed with Ms. Folkes-Abrahams' argument with respect to the law as it relates to discrimination for pregnancy. Mr. O'Flaherty conceded that if Ms. Gosselin had been terminated because she was pregnant, that would have been a violation of the Code. He argued, however, that Ms. Gosselin was not terminated because of her pregnancy, but rather because of the Respondent's general dissatisfaction with her professionalism and her refusal to consent to modify her own program or to sign a waiver with respect to that program. He argued that Ms. Wrighton observed Ms. Gosselin teaching class on October 30 and October 31, 1989, and was concerned about the fact that Ms. Gosselin did not make any accommodation for her pregnancy. Her subsequent refusal to sign a release left Ms. Wrighton and the Kenora Ballet School in a vulnerable position legally and it was that concern that prompted the termination. He argued that it was reasonable for the School to be concerned about their liability and, while indirectly, the request to sign a waiver arose as a result of Ms. Gosselin's pregnant condition, it was her refusal to sign the waiver that necessitated her termination.

DECISION

I am satisfied, based on the evidence before me, that Ms. Gosselin's services as an aerobics instructor at the Kenora Ballet School were terminated as a direct result of her pregnancy. While Ms. Vidovic and Ms. Wrighton may have had concerns about Ms. Gosselin that pre-dated November 1, 1989, there can be no doubt that the decision to terminate her was based solely on the fact that she was pregnant. Irrespective of any other concerns that Ms. Vidovic or Ms. Wrighton may have had about Ms. Gosselin's suitability for continued employment, no steps were taken to deal with their concerns until they became aware of Ms. Gosselin's pregnancy.

Ms. Wrighton and Ms. Vidovic have suggested that Ms. Gosselin's ability to conduct the aerobics class was impaired because of her pregnancy. They suggested that modifications would have been required to accommodate Ms. Gosselin's pregnant condition. I do not accept their evidence on this point. Ms. Gosselin's physician, Dr. Daley, testified that Ms. Gosselin was in excellent physical condition and would have been able to continue teaching her aerobics class until at least the seventh month of her pregnancy. He conceded that modifications to her program might have been required at a later stage in her pregnancy, but those modifications would have been minor in nature. I reject the Respondent's claims that there was cause for them to be concerned about Ms. Gosselin's health and the health of her unborn baby.

As stated previously, there can be no doubt that Ms. Gosselin was terminated from her

position as an aerobics instructor because she was pregnant. Ms. Wrighton's own evidence is that it was Ms. Gosselin's refusal to sign a legal waiver that prompted the decision to terminate her services. In my view, that is a distinction without a difference. The refusal, if there was one, to sign a legal waiver, arose from the fact that Ms. Gosselin was pregnant. That, in my view, constitutes discrimination on the basis of pregnancy. Had it not been for Ms. Gosselin's pregnancy, a legal waiver would not have been requested. There is evidence from Ms. Gosselin's own physician that neither she nor her unborn baby were at risk had she continued to teach that aerobics class. It was not reasonable for Ms. Wrighton demand a legal release in these circumstances.

Having found that the termination of the complainant's employment as an aerobics instructor by the personal respondents infringed Ms. Gosselin's rights under the Code, the issue then becomes what damages should result from that breach and who should be liable for them. The Kenora Ballet School is no longer in operation. During its operation, it was an unincorporated company owned solely by Ms. Vidovic. At the time of the incident Ms. Wrighton was a director of the Company and as such both Ms. Vidovic and Ms. Wrighton are personally and jointly liable for the damages that flow.

Ms. Gosselin's damages constitute the lost income which she would have earned if she had not been dismissed contrary to the Code. She testified that she would have earned an additional \$1,800.00 had she been allowed to continue teaching aerobics at the school and she is entitled to be compensated for that sum of money. Ms. Gosselin has also asked for prejudgment interest on that sum at the Bank of Canada rate of 10% for a period of 3.83 years. Interest in her damages should include an award for that amount of money.

Therefore the special damages owing to Ms. Gosselin are \$2,052.21.

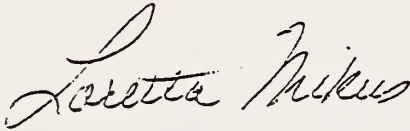
Ms. Gosselin has also asked for general damages in the amount of \$3,000.00 plus interest. Given the method in which her termination was handled, the embarrassment she suffered as a result of her termination, as well as the fact that the class that she had developed and fostered over the years was effectively eliminated I am of the view that she is entitled to an award of general damages in the amount of \$3,000.00, including interest.

ORDER

It is therefore the order of this Board that Ms. Gerda Vidovic and Ms Angie Wrighton pay to the Complainant, Ms. Lynn Gosselin, the following:

- 1) Special damages, including interest, in the amount of \$2052.21
- 2) General damages, including interest, in the amount of \$3300.00

Dated at Toronto this 28th day of February, 1994.

A handwritten signature in cursive script, reading "Loretta Mikus". The signature is written in dark ink and is positioned above the printed name.

Loretta Mikus

